William & Mary
Law Review Online

VOLUME 66 NO. 1, 2024

THE SUPREME COURT SACK[LER]S THIRD-PARTY RELEASES IN CHAPTER 11: SHOULD CONGRESS SEIZE THE CUDGEL?

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INTRODUCTION

On June 27, 2024, the Supreme Court issued its ruling in *Harrington v. Purdue Pharma L.P.*,[1] holding that nonconsensual third-party releases included in a Chapter 11 plan of reorganization, other than one relating to asbestos liability claims, were impermissible under the federal Bankruptcy Code.[2] The releases at issue would have immunized members of the Sackler family, who controlled Purdue Pharma, from liability in connection with the company's role in the opioid crisis.[3] The Sacklers represent the epitome of the unpopular litigant,[4] so no tears need be shed for them. In a sense, they just received a dose of their own medicine.

The decision was as narrow as it gets (five-to-four), and the majority predictably grounded its holding squarely in the statutory text (or absence thereof).[5] I have no particular quibble with that result,[6] as the statutory, unlike the policy, arguments in support of a release from personal liability for nondebtors were always a bit of a stretch. The decision, however, was disconcertedly overbroad in failing to clearly distinguish direct and derivative claims, and it will inevitably make it more difficult to formulate and confirm mass tort

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1. 144 S. Ct. 2071 (2024).

2. *Id.* at 2087-88. Except where the context requires otherwise, references in this Article to the "Code" or the "Bankruptcy Code" are to the current law of bankruptcy, which is found in Title 11 of the United States Code. 11 U.S.C. §§ 101-1532, as amended. It was enacted on November 6, 1978, as the Bankruptcy Reform Act of 1978 and governs all cases filed on or after October 1, 1979. Pub. L. No. 95-598, 92 Stat. 2459 (codified as amended at 11 U.S.C. §§ 101-1532).

3. *Purdue Pharma*, 144 S. Ct. at 2078-79.

4. *See infra* note 115. The bankruptcy court found that the Sacklers hid dividends they caused to be distributed to them from Purdue Pharma in offshore trusts, self-settled spendthrift trusts, and other asset protection schemes to make it difficult or impossible for their creditors to collect from them. *See In re* Purdue Pharma, L.P., 633 B.R. 53, 88, 93 (Bankr. S.D.N.Y. 2021). The Sackler family also received pervasive negative national publicity. *See infra* note 115 and accompanying text.

5. Particularly in bankruptcy cases, the Court has, with few exceptions, adopted a strict textualist approach, which enforces the plain meaning of the statute's words and, thus, refuses to consider non-textual evidence unless the language is unclear. *See generally* Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413 (2019).

6. Indeed, I joined an amicus brief supporting the petitioner on this basis. *See* Brief of the Honorable Eugene Wedoff (Ret.) et al. as Amici Curiae in Support of the Petitioner, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024) (No. 23-124).

reorganizations. This effect will be unfortunate—both for mass tort debtors and their victims.

Shortly before the *Purdue Pharma* decision was issued, I penned an essay in response to the vitriol that has been hurled at the use of state law divisive merger statutes as a mechanism for resolving mass tort liability in Chapter 11.[7] The piece was and is not a defense of or apology for the so-called Texas-Two-Step maneuver.[8] Frankly, on that score, I am agnostic. However, I believe there is nothing intrinsically nefarious nor inherently beneficent about a Texas-Two-Step filing in the abstract.

Rather, the piece was, if anything, a defense of Chapter 11 as an unrivaled, albeit not perfect, vehicle for aggregating, managing, and ultimately resolving mass tort claims.[9] Simultaneously, it was a revival of a long-standing *cri-de-coeur* that good faith filings in Chapter 11 be tested on a case-by-case basis, with considerable latitude granted to the bankruptcy judge's assessment if the filing represents a proper invocation of ever-evolving bankruptcy purposes.[10]

By prophylactically taking nonconsensual nondebtor releases off the table, *Purdue Pharma* has rendered reorganization a less effective tool for achieving a global resolution of both existing and, in particular, future mass tort claims. In some quarters, that has been cheered as a vindication of constitutional protections afforded the victims of dangerous products, sexual abuse, consumer fraud, or

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7. Lawrence Ponoroff, *Mass-Tort Litigation, Chapter 11, and Good Faith: Let not Perfect Be the Enemy of Pretty, Pretty Good*, 74 DUKE L.J. ONLINE 1, 9-10 (2024), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1117&context=dlj_online [https://perma.cc/TGW2-YQ32].

8. *Id.* at 25-26.

9. *Id.*; *see* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 494 (2022) ("[B]ankruptcy is still the optimal venue for resolving many mass tort cases."); *see also* Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 412 U.C. DAVIS L. REV. 1613, 1616 (2008) (bankruptcy system can succeed in the fair and efficient resolution of mass tort claims "where other mechanisms have failed"). *But see* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1188-92 (2022) (contending that in cases like *Purdue Pharma*, Chapter 11 is being used and abused beyond its intended scope).

10. Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 944-45 (1991) (noting that bankruptcy purposes are neither finite nor fixed, but rather evolving in response to commercial exigency).

noxious environmental emissions.[11] I think such constitutional claims are exaggerated, but it was not the basis for the majority decision in *Purdue Pharma*, and it is not my intention to debate them here. Rather, my position is that it should now be put to Congress to decide if and under what circumstances a channeling injunction in a non-asbestos-related case might be extended to include nondebtor entities.

I. BACKGROUND

A. Manville *and § 524(g)*

As part of the Bankruptcy Reform Act of 1994,[12] § 524(g) was added to the Bankruptcy Code to codify a procedure originally engineered by the United States Bankruptcy Court for the Southern District of New York in *In re Johns-Manville Corp*.[13] This bankruptcy case was one of the earliest mass tort Chapter 11 cases to be filed under the Code.[14] In *Manville*, after years of negotiation, the key players agreed upon, and the court confirmed, a plan that included an "Asbestos Health Trust," which the court described as "a mechanism designed to satisfy the claims of all asbestos health victims, both present and future."[15] As an essential component of the plan, the parties also agreed that the bankruptcy court would issue a "channeling injunction" restricting all existing and future

11. *See generally* Ralph Brubaker, *Mass Torts, the Bankruptcy Power, and Constitutional Limits on Mandatory No-Opt-Outs Settlements*, 23 FLA. ST. U. BUS. REV. (forthcoming 2024) (manuscript at 15) (on file with author); Melissa B. Jacoby, *Sorting Bugs and Features in Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1747 (2023) (questioning the ability of Chapter 11 to deliver meaningful relief within the parameters of constitutional rights and preclusions).

12. Pub. L. No. 103-394, 108 Stat. 4106 (1994) [hereinafter 1994 Act].

13. 68 B.R. 618, 624 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636 (1988).

14. The first company to file for bankruptcy under Chapter 11 in relation to asbestos-related claims was UNR Industries, Inc. It filed along with ten affiliates, including Unarco Industries. *In re* UNR Indus., Inc., 29 B.R. 741, 743 (N.D. Ill. 1983). Unarco manufactured several insulation products using highly toxic asbestos mined in South Africa. Michelle Whitmer, *Unarco*, MESOTHELIOMA CTR. (July 18, 2024), https://www.asbestos.com/companies/unarco/ [https://perma.cc/SK7M-DA8R].

15. 843 F.2d at 640; *A History of Asbestos and the Manville Trust Fund*, WASH. POST (Nov. 20, 1990, 7:00 PM), https://www.washingtonpost.com/archive/business/1990/11/20/a-history-of-asbestos-and-the-manville-trust-fund/fb60ed34-2a94-4570-9648-9e2efb8167f0/ [https://perma.cc/CR93-VR4G].

asbestos-related claims to the trust,[16] thereby protecting Manville, its other operating entities, and its insurers from all asbestos-related lawsuits. This was perceived as necessary due to the long dormancy of asbestos diseases and, thus, to the prospect of large numbers of future claims.[17]

Generally speaking, § 524(g) follows the *Manville* playbook, allowing debtors facing massive asbestos-based liability claims, whether raised in the case or contingent on a future event, to fund a settlement trust as the exclusive source of recovery for all asbestos exposure claims. Subsection (g) contains a number of additional requirements that must be met.[18] These requirements include that the debtor is likely to be subject to a substantial yet currently uncertain amount of future liability arising out of the same or similar conduct that gave rise to the claims addressed by the injunction, the pursuit of which would threaten the purpose of the plan of reorganization to deal equitably with future demands.[19] Effectively, in exchange for funding the trust, the court issues a channeling injunction providing immunity to the reorganized debtor from liability on such claims. Of course, this allows the firm to continue operations free from the distracting shadow of ongoing merciless litigation.

Unlike in the traditional Chapter 11 case, subsection (g) also requires that the plan must be approved by 75 percent of the known tort victims,[20] as opposed to a mere majority as otherwise mandated by the Code.[21] Finally, to satisfy the requirement of due process, a

16. *In re Johns-Manville*, 843 F.2d at 640.

17. The latency period—between initial asbestos exposure and a mesothelioma diagnosis—commonly ranges from twenty-to-sixty years. Kristopher Bunting, *Mesothelioma Latency Period*, MESOTHELIOMA CTR. (Oct. 18, 2024), https://www.asbestos.com/mesothelioma/latency-period [https://perma.cc/MVE2-VJ45]. If the holders of such "future" claims could bring suit as and when they developed an asbestos-related disease, it would be virtually impossible for a company with asbestos liabilities to reorganize in bankruptcy because these claims would not be subject to the discharge.

18. 11 U.S.C. § 524(g)(2)(B). Generally speaking, § 524(g) layers additional requirements on top of those already in place for confirmation of a Chapter 11 plan. *Id.* § 524(g)(1)(A).

19. *Id.* § 524(g)(2)(B)(ii)(I)-(III).

20. *Id.* § 524(g)(2)(B)(ii)(IV)(bb).

21. *See* 11 U.S.C. § 1126(c). There is no separate approval by value of claims, as otherwise exists for confirmation generally, because the identity and nature of future claimants' injuries are, by definition, unknown at the time of voting. *See* Katherine N. Anand, Note, *Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms*

future claimants' representative,[22] who is not eligible to vote on the plan, is appointed to negotiate on behalf of unknown claimants.[23] While limited to asbestos-related claims, Congress made explicit that no negative inference was to be drawn from that fact in non-asbestos mass tort proceedings.[24]

Of particular note for purposes of the instant treatment, § 524(g) also permits, without mentioning "releases" explicitly, the bankruptcy court to enjoin assertion of claims against certain categories of third-party nondebtors that are "alleged to be directly or indirectly liable for the conduct of" or claims made against the debtor,[25] to the extent this alleged liability arises from their past or present affiliation with, management of, or service as a director or officer to the debtor.[26] Again, however, this authority is limited to, and only to, cases where the debtor has been named as a defendant in a tort claim relating to the "presence of, or exposure to, asbestos or asbestos-containing products" at the time it filed its bankruptcy petition.[27] Lastly, in order to include nondebtors under the channeling injunction, § 524(g) requires the bankruptcy court to determine

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That Effectively Discharge Asbestos Claims in Chapter 11 Reorganization, 80 NOTRE DAME L. REV. 1187, 1201 (2005).

22. In a somewhat surprising recent decision, a New York bankruptcy court held that future asbestos claims can be discharged without a § 524(g) trust. *In re* RML, L.L.C., No. 22-10784, 2024 WL 3770047, at *5-6 (Bankr. S.D.N.Y. Aug. 12, 2024).

23. 11 U.S.C. § 524(g)(4)(B)(i)-(ii). Also, the court must have "reasonable assurance" that the trust will operate in a manner such that similar claims will be treated "in substantially the same manner." *Id.* § 524(g)(2)(B)(ii)(V).

24. Section 111(b) of the 1994 Act provides a "[r]ule of [c]onstruction" that "[n]othing in subsection (a)"—codified as 11 U.S.C. § 524(b)—"shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."

25. 11 U.S.C. § 524(g)(4)(A)(ii). Despite this language, the Third Circuit has taken the view that the liability covered by such an injunction must be "derivative" of the debtor, meaning that under state law, the third party's liability must depend on the debtor's liability. *In re* W.R. Grace & Co., 900 F.3d 126, 137 (3d Cir. 2018). And it must be limited to liability that is a "legal consequence" of a statutory relationship (such as insurer, director, etc.) between the third party and the debtor. *Id.* at 138.

26. 11 U.S.C. § 524(g)(4)(A)(ii). Section 524(g)(4) also authorizes third-party releases for the benefit of a debtor's insurer. *Id.* Where an insurer settles with a debtor prior to confirmation, § 524(g)(4) permits the insurer to obtain the benefit of the channeling injunction, which operates to protect the insurer from any liability that any person may seek to impose on it that derives from the debtor's liability *and* results from the insurer's issuance of insurance to the debtor. *See id.*

27. *Id.* § 524(g)(2)(A)(B)(i)(I).

that the extension of the injunction's protective halo is "fair and equitable" to those who might assert demands subject to the injunction in light of the third party's contributions to the trust.[28]

B. Lead-Up to Purdue Pharma

In the aftermath of *Manville*, defendants—hit with a barrage of asbestos- and non-asbestos mass tort suits and frustrated with the delay and inadequacies of state and non-bankruptcy federal alternatives—turned to Chapter 11 to achieve an alacritous and global resolution of the mass tort claims. This included, in some cases, nonconsensual third-party releases. For example, *In re Dow Corning Corp.* saw a firm use Chapter 11 to receive relief from from lawsuits concerning silicone gel breast implants alleged to cause autoimmune issues.[29] There, the Sixth Circuit held that the *Manville* and § 524(g) approach could be replicated in non-asbestos cases utilizing § 105(a)'s grant of general equitable authority—the provision the court had relied on in *Manville*.[30] Moreover, the *Dow Corning* opinion also expanded the circumstances as to when a channeling injunction could extend to nondebtors.[31] This made Chapter 11 that much more enticing to mass tort defendants, even if it came at the cost of bearing the stigma of a bankruptcy filing.

The majority of circuits (as well as other courts) agreed with the Sixth Circuit's conclusion that nonconsensual nondebtor releases were permissible under the courts' § 105(a) authority,[32] although

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28. *Id.* § 524(4)(B)(ii).

29. 280 F.3d 648 (6th Cir. 2002).

30. *See id.* at 653, 656, 658 (citing to *Manville* to support the conclusion that this case is an "unusual circumstance" in which enjoining a non-consenting creditor's claim is appropriate). For *Manville*'s holding, see *In re* Johns-Manville Corp., 68 B.R. 618, 625-26 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636 (1988).

31. *See infra* text accompanying notes 130-135.

32. *See, e.g.*, *In re* Millennium Lab Holdings II, L.L.C., 945 F.3d 126, 137-40 (3d Cir. 2019) (permitting nondebtor releases when factual findings demonstrate they are fair and necessary to the reorganization); Nat'l Heritage Found. v. Highbourne Found., 760 F.3d 344, 350 (4th Cir. 2014) ("[T]he power to authorize non-debtor releases is rooted in a bankruptcy court's equitable authority."); *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) (holding that the language of § 524(e) "does not purport to limit or restrain the power of the bankruptcy court to otherwise grant a release to a third party" and that a "rule disfavoring all releases in a reorganization plan would be ... unwarranted, if not a misreading" of

there was no unanimity as to precisely what factors or findings should be taken into account in determining whether a proposed release was appropriate.[33] Sounding a contrarian note, the Fifth and Tenth Circuits disagreed with the proposition that, except under § 524(g), the bankruptcy courts had authority to approve over the objection of creditors a plan that provided for release of nondebtor parties or an injunction precluding assertion of claims against such parties.[34] The Ninth Circuit, for a time, joined the minority,[35] but later switched horses.[36] This was the lay of the land in 2019 when Purdue Pharma filed its Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York.

C. Proceedings Below in Purdue Pharma

At the time of Purdue Pharma's bankruptcy filing, the company and its controlling shareholders, members of the Sackler family,[37]

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§ 524(e)); SE Prop. Holdings, L.L.C. v. Seaside Eng'g & Surveying, Inc. (*In re* Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070, 1078 (11th Cir. 2015) ("[T]he natural reading of this provision ... says nothing about the authority of the bankruptcy court to release a non-debtor from a creditor's claims.").

33. These courts did agree, however, that the power to authorize nondebtor releases was rooted in the bankruptcy courts' equitable authority and that § 524(e) did not foreclose a third-party release from a creditor's claims. *See, e.g.*, *In re* Mallinckrodt P.L.C., 639 B.R. 837, 866-68, 879 (Bankr. D. Del. 2022).

34. *See* Bank of N.Y. Trust Co. v. Off. Unsecured Creditors' Comm. (*In* re Pac. Lumber Co.), 584 F.3d 229, 251-53 (5th Cir. 2009); *In re* W. Real Est. Fund, Inc., 922 F.2d 592, 600-01 (10th Cir. 1990).

35. Resorts Int'l, Inc. v. Lowenschuss *(In re* Lowenschuss), 67 F.3d 1394, 1401-02 (9th Cir. 1995).

36. Blixseth v. Credit Suisse, 961 F.3d 1074, 1083-84 (9th Cir. 2020) (suggesting, contrary to *Lowenschuss* and other previous rulings, that § 524(e) does not preclude certain nondebtor plan releases of claims that are not based on the debt discharged by the plan).

37. As described by Second Circuit's opinion in the *Purdue* case:

> The Sackler brothers, including Mortimer and Raymond Sackler, purchased Purdue, a privately held pharmaceutical company, in the 1950s. Members of the Sackler family held various director and officer positions throughout the company and, from approximately 1993 to 2018, Purdue's Board of Directors contained at least six members of the Sackler family. Beyond the board, Sackler family members held other positions of influence in the company. For example, Mortimer and Raymond Sackler served as co-chief executive officers until their deaths, Richard Sackler served as a president, and Mortimer D.A., Ilene, and Kathe Sackler all served as officers.

In re Purdue Pharma L.P., 69 F.4th 45, 58 (2d Cir. 2023) (footnote omitted), *rev'd and remanded*, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024).

were defendants in 3,400 lawsuits seeking an estimated $40 trillion (that is not a typo) in damages.[38] "The value of Purdue[Pharma's] assets was estimated at no more than $1.8 billion."[39] In September 2021, Purdue Pharma obtained confirmation of a Chapter 11 plan that included nonconsensual releases of various third parties, including the Sackler family, of liabilities stemming from their involvement in alleged deceptive and illegal activities undertaken by Purdue Pharma in marketing OxyContin and other opioid products.[40] In exchange, the Sackler family would relinquish its ownership interest in the companies and contribute more than $4 billion to the settlement of the OxyContin litigation claims.[41]

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38. Jane Rue Wittstein, *Second Circuit Green Lights Purdue Pharma Chapter 11 Plan Containing Nonconsensual Third-Party Releases*, JONES DAY: INSIGHTS (July 18, 2023), https://www.jonesday.com/en/insights/2023/07/second-circuit-green-lights-purdue-pharma-chapter-11-plan-containing-nonconsensual-thirdparty-releases [https://perma.cc/537W-V9GT]. Eventually, the claims filed in the *Purdue* case would total an astonishing $140 trillion. *See* Jeanne L. Schroeder & David Gray Carlson, *Third-Party Releases Under the Bankruptcy Code After* Purdue Pharma, 31 AM. BANKR. INST. L. REV. 1, 39 (2023).

39. *See* Wittstein, *supra* note 38.

40. Just before the Department of Justice changed hands at the end of 2020, Purdue Pharma signed a criminal plea agreement with a special provision to protect itself from liquidation. *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, OFF. PUB. AFFS., DEP'T JUST. (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid [https://perma.cc/D4EG-52D9]. The company promised to take $2 billion away from the money slated for victims and treatment if it were liquidated. However, the plea agreement also stipulated that the Department of Justice would agree to release $1.775 billion of its $2 billion claim so long as a future distribution plan established an abatement trust for the public benefit and a document repository created. *Id.*; *see also* Adam J. Levitin, Purdue's *Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1110-12 (2022) (discussing the reality that, without a settlement, the Department of Justice would pursue its criminal and civil claims against the company in the amounts of $9.7 billion and $8.3 billion respectively, which would leave the company with no assets from which claimants could recover). Such judgments would leave companies with no assets from which plaintiffs could prevail.

41. As Professors Schroeder and Carlson have pointed out, Judge Drain's decision in the bankruptcy court described the third-party releases as applying to only derivative claims, but he expanded the definition of "derivative claims" to include direct claims where there is a "meaningful overlap" between the claim and the debtor's conduct, even though, as a legal matter, that claim could not have been brought by the debtor. *See* Schroeder & Carlson, *supra* note 38, at 39-42. He premises this circumlocution based on a concern of claims against the debtor being backdoored by virtue of the individual defendants' indemnity rights. *Id.* This point was not lost at the district or circuits courts, which characterized the issue as Judge Drain's authority to release direct claims. *See In re* Purdue Pharma, L.P., 635 B.R. 26, 90 (S.D.N.Y. 2021), *vacated and remanded*, *In re* Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023),

Although approved by a large majority of claimants,[42] the U.S. Trustee, eight states, the District of Columbia, the City of Seattle, and various Canadian municipalities and Tribes—each of which wanted to preserve its own claims against the Sacklers—objected.[43] These parties, along with three individual personal injury claimants, appealed the confirmation. In December 2021, the U.S. District Court for the Southern District of New York vacated the plan confirmation order, ruling that the bankruptcy court did not have authority under the U.S. Constitution or the Bankruptcy Code to approve the nonconsensual releases granted under the plan.[44] Specifically, the district court found that the issue of releasing claims against nondebtors was "non-core" and that, therefore, under the Supreme Court's ruling in *Stern v. Marshall*,[45] the bankruptcy court lacked the constitutional imprimatur to enter a final order adjudicating such claims.[46] Instead, the bankruptcy court should have issued proposed findings of fact and conclusions of law regarding the releases to the district court.[47] In its marathon opinion, the district court conceded that bankruptcy courts possess subject matter jurisdiction over third-party claims against nondebtors,[48] but concluded that the *release* of such claims was beyond either the statutory or equitable purview of the courts.[49]

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rev'd and remanded, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024) ("The topic under discussion is a bankruptcy court's power to release, on a non-consensual basis, *direct/particularized* claims asserted *by third parties* against *non-debtors*."); *see also* Whittaker, Clark & Daniels, Inc. v. Brenntag AG (*In re* Whittaker, Clark & Daniels), Case No. 23-135575, 2024 WL 3811311 *13 (Bankr. D.N.J. Aug. 13, 2024) (following Judge McMahon's analysis of the direct/derivative distinction in the district court opinion in *Purdue Pharma*, 635 B.R. at 90).

42. While over 95 percent of the tort claimants who voted on the plan voted favorably, over 80 percent did not vote at all. *Purdue Pharma*, 144 S. Ct. at 2079, 2098. However, because Chapter 11 only counts votes, the non-voters are effectively ignored in the confirmation process.

43. *Id.* at 2079-80.

44. *In re Purdue Pharma*, 635 B.R. at 78, 80.

45. 564 U.S. 462, 503 (2011).

46. *In re Purdue Pharma*, 635 B.R. at 79-82.

47. *Id.* at 82. However, because only issues of law had been challenged, the court ruled that the practical import of this holding was non-existent. *Id.* at 82 n.54.

48. *Id.* at 83-85.

49. The district court wrote:

> Contrary to the bankruptcy judge's conclusion, Sections 105(a) and 1123(a)(5) & (b)(6) [of the Code], whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as "equitable

The Second Circuit granted leave to appeal the interlocutory order of the district court, and, before the case was heard, the Sacklers agreed to add an additional $1.6 billion to the $4.3 billion settlement pot that they were to pay under Purdue Pharma's original Chapter 11 plan.[50] Almost a year and a half later, the Second Circuit issued its long and eagerly awaited decision affirming the bankruptcy court's original confirmation order and remanding for further proceedings.[51] The three-judge panel, including one reluctant concurrence,[52] found (1) that the bankruptcy court had both jurisdiction and statutory authority to approve nonconsensual third-party releases[53] and (2) that such releases complied with due process and were proper under this case's facts and equities.[54]

Notably, the Second Circuit opinion, like the district court, framed the issue of law in the case as whether the bankruptcy court had the capacity to approve the nonconsensual release of *direct* third-party claims against the Sacklers.[55] In doing so, the Second Circuit rejected the bankruptcy court's expanded definition of derivative claims,[56] and at least implied the absence of controversy over whether releases could apply to derivative claims, which, once the case was filed, belonged solely to the estate.

> authority" or "residual authority" in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code.

Id. at 78.

50. Pending the Second Circuit's hearing and deliberations on the dispute, a court-appointed mediator explored a possible global settlement between Purdue and parties opposing the plan. As a result of these negotiations, many parties agreed to the terms of a revised plan, reflecting, among other things, the Sackler family's increased financial contribution. This resolved the objections of the governmental entities. *See In re* Purdue Pharma L.P., 69 F.4th 45, 67-68, (2d Cir. 2023).

51. *Id.* at 85. The court agreed with the district court that the practical import of *Stern* was an issue of no import since only conclusions of law were at issue, calling for de novo review in any case. *Id.* at 69.

52. Judge Wesley issued a separate opinion indicating that he was "reluctantly concur[ring]" based on established circuit precedent. *Id.* at 85 (Wesley, J., concurring).

53. *Id.* at 71-73 (majority opinion).

54. *Id.* at 82-83.

55. *Id.* at 57.

56. See *supra* note 41 for a discussion concerning the "expanded" definition of a derivative claim in the lower court opinions.

D. But Wait, There's More!

The Supreme Court initially stayed implementation of Purdue Pharma's plan while the Court considered the issue.[57] Ultimately, of course, the Court reversed the Second Circuit, the majority opinion holding that no provision of the Bankruptcy Code ordains the bankruptcy courts with the power to provide what is tantamount to a discharge to a party that has not itself filed for bankruptcy or placed virtually all of its assets on the table for distribution to creditors.[58] Rather, the majority found that discharge is reserved for the debtor and "does not affect the liability of any other entity."[59] Therefore, the Court ruled that, save for cases covered by § 524(g), the Code does not permit the bankruptcy courts to enjoin or release claims against third-parties without the consent of the creditor(s),[60] and that § 105(a) alone cannot form the basis for locating such authority.[61] The majority opinion never addressed the distinction between direct and derivative claims except in the context of replying to the dissent's assertion that the ability to release derivative claims is "indisputable."[62] What the Court did *not* decide in *Purdue Pharma* is discussed later.[63]

In an unusual coalition traversing traditional ideological lines, the Chief Justice, Justice Kagan, and Justice Sotomayor joined Justice Kavanaugh's lengthy dissenting opinion,[64] which located the necessary statutory approbation in the combination of sections 1123(b)(1), (3), and (6).[65] In fact, the dissent opined that the bankruptcy court's exercise of its discretion in approving the releases was a "shining example of the bankruptcy system at work."[66] Noting that

57. Harrington v. Purdue Pharma L.P., 144 S. Ct. 44 (2023) (Sotomayor, J., in chambers).

58. Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2081 (2024).

59. *Id.* (quoting 11 U.S.C. § 524(e)).

60. *Id.* at 2081-85 (rejecting Purdue Pharma and the Sacklers' argument that such authority could be found in § 1123(b)—particularly, § 1123(b)(3) & (6)).

61. *Id.* at 2082 n.2.

62. *Id.* at 2083-84. The dissent posited that the bankruptcy courts' indisputable ability to settle derivative claims established that 1123(b)'s provisions relate only to the debtor and not to claims held against nondebtors. *Id.* at 2107 (Kavanuagh, J., dissenting).

63. *See infra* text accompanying notes 144-148.

64. *Purdue Pharma,* 144 S. Ct. at 2088 (Kavanaugh, J., dissenting).

65. *Id.* at 2091.

66. The dissent elaborated:

> [V]irtually all of the opioid victims and creditors in this case fervently support

"[m]ass-tort cases present the same collective-action problem that bankruptcy was designed to address,"[67] the dissent lamented that the majority's opinion had, for "no good reason," deprived the bankruptcy courts of an important tool in managing mass tort bankruptcies and devastated the "more than 100,000 opioid victims and their families."[68]

This was both a great and a hard case that, as predicted by Justice Holmes,[69] may have made bad law. However, if one is inclined to take a narrow textualist approach to statutory interpretation, as this Court is wont to do,[70] the outcome was not unexpected,[71] and it is perhaps even surprising that it was as close of a call as it was. In any case, for better or worse, the matter has now been settled, and so the question becomes what to do next. While there may be some wiggle room at the margins,[72] the basic alternatives are binary: Do nothing, or amend the Code to authorize even nonconsensual third-party releases.

II. RESPONSE TO *PURDUE PHARMA*?

A. Do Nothing

The *Purdue Pharma* decision will not eliminate mass tort bankruptcies because the processes and procedures available in Chapter 11 still make it a very viable alternative to disparate and uncoordinated litigation in the state and non-bankruptcy federal courts. Chapter 11's most important features remain its abilities to

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> approval of Purdue's bankruptcy reorganization plan. And all 50 state Attorney General have signed on to the plan ... —a rare consensus. The only relevant exceptions to the nearly universal desire for plan approval are a small group of Canadian creditors and one lone individual.

Id. at 2088.

67. *Id.* at 2092.

68. *Id.* at 2088-89. Concluding his dissent, Justice Kavanagh described the majority opinion as "mak[ing] little sense legally, practically, or economically." *Id.* at 2115.

69. N. Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

70. *See supra* note 5.

71. I doubt, however, anyone would have accurately predicted the alignment of the individual Justices.

72. *See infra* Part IV.

(1) consolidate all mass tort claims in a single procedure;[73] (2) address the issue of unknown, future claims;[74] and (3) ensure uniform and equal treatment among claimants.[75]

It is true that there are other aggregation devices available, most notably multidistrict litigation ("MDL") and class actions. In the case of the former,[76] however, federalism complicates the ability to truly achieve a complete settlement of all claims, as there is no formal jurisdiction in a federal MDL over cases filed and still pending in state court.[77] In addition, MDL judges have only pretrial jurisdiction over the cases brought into the consolidated proceeding.[78] Thus, any efficiencies gained through the combination of cases evaporate if cases are sent back to their individual home jurisdictions for trial, although, in fact, most MDL cases end up being settled before they can be returned.[79] This fact, however, highlights two other limitations of the MDL process. First, and of greatest import, only claims that have actually been filed in federal court can be included in the settlement,[80] leaving a potentially large number of future plaintiffs who will be unaffected by the

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73. The district court presiding over a bankruptcy case has the power to transfer to itself, and thus the bankruptcy court, all claims "related to" the bankruptcy proceeding. 28 U.S.C. § 157(a), (b)(5). This broad statutory authority implements the ultimate goal in mass tort litigation—to obtain "a single, uniform, fair, and efficient resolution of all claims growing out of a set of [related] events." Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 947 (1998). Ultimately, it is virtually impossible for related litigation to escape bankruptcy consolidation, thus allowing parties to litigate common issues and negotiate a global resolution in the form of a reorganization plan. For this reason, the bankruptcy court exercises "a unique jurisdictional arsenal" that creates a superior venue for resolving sprawling mass-tort cases. Parikh, *supra* note 9, at 481.

74. 11 U.S.C. § 524(g)(4)(B)(ii).

75. *Id.* § 1123(a)(4).

76. *See generally* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 913 (2017).

77. *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 47 (2021) (discussing federalism as an "MDL disruptor").

78. *See* 28 U.S.C. § 1407(b).

79. *See* Morgan A. McCollum, Note, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938, 945 (2019) (revealing that only about 2.9 percent of cases assigned for MDL end up returning to the court where they originally were filed); *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1855 (2022) (discussing the settlement structure and pressures in multidistrict cases).

80. McCollum, *supra* note 79, at 942.

settlement.[81] Second, unlike in class actions and bankruptcy, there is neither judicial supervision over the settlement process nor any requirement that the settlement be approved by the court.[82]

Class actions could be a favorable aggregation device mass tort liabilities because, in such cases, the court remains fully involved throughout the life cycle of the case and must approve any proposed settlement agreement.[83] However, while all cases sharing a common question of fact may be transferred temporarily to the MDL judge, class actions cases must fall within a category enumerated in FRCP 23(b) to even be eligible for class treatment and class members must be given the opportunity to opt out.[84] The former has proved to be a dealbreaker for mass tort cases, as two Supreme Court decisions rendered in the 1990s[85] have all but ensured that mass tort class filings will not achieve certification.[86] And, of course, even if the class device were available, studies and experience suggest that class actions rarely result in meaningful recovery for class members.[87]

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81. *Id.*; Parikh, *supra* note 9, at 477 (pointing out that future claims cannot be aggregated in an MDL settlement).

82. *See* Burch & Williams, *supra* note 79, at 1852-53. Burch and Williams also observe that settlement culture in MDLs encourages plaintiffs' lawyers to persuade their clients to take the offered deal. *Id.* at 1855.

83. *See* D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN STATE L. REV. 303, 310 (2020) (addressing the role of the court in approving any proposed settlement).

84. *See id.* at 309-10 (2019) (discussing a court's role in class actions, including in fairness of settlement terms).

85. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 641 (1997). In both instances, the Court rejected proposals for settlement of asbestos claims within the tort system, finding that common issues of law or fact did not predominate as required under Rule 23(b)(3) and, therefore, the named parties could not properly protect the interests of the class as required under Rule 23(a)(4). *Ortiz*, 527 U.S. at 858; *Amchem*, 521 U.S. at 625-26. Moreover, in *Ortiz*, the Court concluded that "to aggregate unliquidated tort claims on a limited fund rationale" would "significantly undermine the protections for creditors built into Bankruptcy Code." 527 U.S. at 843, 860 n.34.

86. *See generally* David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV., 1565, 1575-88 (2017) (providing an in-depth examination into the demise of mass tort class actions and the hope for their possible resurrection).

87. *See generally* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1564, 1566 (2004) (describing and researching the opt-out procedure, concluding that opt-out data is weak evidence of the quality of a settlement).

With the bankruptcy courts' nationwide jurisdiction[88] and the Code's automatic stay,[89] Chapter 11 offers certain advantages that are simply unavailable in multidistrict litigation and certainly in conventional civil litigation.[90] All claims arising out of the harmful product, toxic emission, or other wrongful conduct can be centralized and resolved on a global basis in a single bankruptcy proceeding.[91] This includes claims that have yet to arise because of the absence of knowledge or manifestation of injury.[92] As one commentator who has extensively examined the mass tort landscape has commented, "[B]ankruptcy is still the optimal venue for resolving many mass tort cases."[93] The process provides closure to mass tort litigation and expedites compensation to victims. Meanwhile, Chapter 11 gives financially distressed debtors time to reorganize, revamp, and continue doing business so that the firm has the chance to survive.[94]

Some criticize mass tort bankruptcy because, notwithstanding the ability to render an all-encompassing resolution on an equitable basis, there are certain nonquantifiable losses claimants suffer once the case enters into a reorganization proceeding. Principal among these are individual voice rights and the ability to exercise the same level of control and participation as would be the case if the action proceeded as a disjoined piece of civil litigation.[95] Inevitably this is

88. *See* 28 U.S.C. § 157(a), (b)(5) ("related to" jurisdiction).

89. *See* 11 U.S.C. § 362(a).

90. As far back as 1997, the National Bankruptcy Review Commission recognized both the existing and the potential advantages of bankruptcy to other aggregation alternatives (most notably class actions as MDLs were not, at the time, firmly on the horizon), citing "rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case." NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 340 (1997), https://govinfo.library.unt.edu/nbrc/reportcont.html [https://perma.cc/E5MK-U9RD].

91. 11 U.S.C. § 502(c)(1) authorizes the bankruptcy court to estimate contingent and unliquidated claims, ensuring the debtor a complete discharge of its debts so that it will not be subject to unknown, future claims riding through the bankruptcy.

92. *See* Parikh, *supra* note 9, at 462.

93. *Id.* at 494; *see also* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass* Torts, 90 U. CHI. L. REV. 973, 976 (2023) (identifying how criticisms of such cases can be mitigated from within the bankruptcy system as currently incarnated).

94. *See* Casey & Macey, *supra* note 93, at 977.

95. *See* William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723, 757 (2024) (discussing the dignitary as well monetary rights of victims); *see also* Taylor v. Sturgell, 553 U.S. 880, 891, 893-95 (2008) (listing private settlements, class actions, and bankruptcy as narrow exceptions—circumscribed by due process—to a deep-rooted American tradition that each person is entitled to their day in court).

true, but to a significant, if not greater equal, the same can be said of the multidistrict process.[96]

Moreover, as one author has recently pointed out, bankruptcy's voting procedures mediate a sportsman-like compromise between group and individual voice rights.[97] That is to say, while all claimants are entitled to cast a yea or nay vote on the proposed reorganization plan, the full enjoyment of this right can be subordinated to the will of the majority of the class to which the claim has been assigned. Thus, there is unquestionably some loss in the autonomy and the control that an individual litigant can exert in conventional civil litigation, but, again, this is no less true in multidistrict litigation. Inescapably a compromise of some sort must be struck in any collective action proceeding.[98]

So, *Purdue Pharma* notwithstanding, Chapter 11 remains an attractive surrogate to multidistrict litigation as well as class actions—to the extent that avenue even remains an option[99]—and certainly to disjointed traditional state and non-bankruptcy federal court civil litigation. The efficiency gains are not trivial in comparison, and the debtor firm obtains the temporary benefit of the automatic stay and the lasting benefit of the discharge if a plan can be successfully confirmed and completed.[100] Survival of the company as an on-going entity also means continuation of employment for perhaps thousands of individuals, a reliable customer for vendors, an asset for the community in terms of both economic activity and philanthropy, and a return on investment for owners.[101]

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96. *See, e.g.*, Burch & Williams, *supra* note 79, at 1925 ("MDL contributes court access and cost savings (perhaps principally for attorneys), but exacts a steep toll on legitimacy, dignity, accuracy, and due process.").

97. Jonathan L. Goldberg, Note, *"Otherwise Consistent": A Due Process Framework for Mass-Tort Bankruptcies*, 98 N.Y.U. L. REV. 1696, 1738 (2023). The author continued that both individual and group rights "are necessary to the legitimacy of any reorganization plan." *Id.*

98. *See generally* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015).

99. *See supra* notes 85-87 and accompanying text.

100. *See supra* notes 89-91 and accompanying text.

101. *See* Casey & Macey, *supra* note 93, at 1000 ("Even for solvent companies, spending resources on redundant litigation diverts value from public shareholders, employees, communities, and other beneficiaries.").

B. Expand the Authority of the Bankruptcy Courts Under 524(g)

In light of the foregoing, is there even a reason for considering a legislative reversal of *Purdue Pharma*? The answer lies in the identification of what ought to be the predominant goals in a mass tort situation. I believe those include, first and foremost, prompt compensation of, and closure for, victims and their families. Beyond that, there is genuine concern over relative equality among similarly situated claimants and a fair adjustment of unknown future demands.[102] Bankruptcy is the only collective action mechanism that can consistently achieve all these goals.[103]

Put another way, mass tort cases ought not be about attaining the absolute highest compensation for any individual victim nor about maximum compensation for plaintiffs' attorneys. Protracted litigation could produce either of those ignoble goals, but is that truly in the best interests of the tort claimants as a group and their survivors, or is it a Cadmean victory at best? Chapter 11 is not infrequently criticized for ignoring the individual dignity of claimants in mass tort cases in the myopic pursuit of cutting a deal.[104] And yet, those whose dignity has been injured, as opposed to those who write about them, overwhelming *want* to cut a deal.[105]

In some mass tort situations, the proper goals of the system may be served without the need for third-party releases. In many others, however, such as *Purdue Pharma*, the result likely will be liquidation of the company, unless another (and inevitably lesser) settlement is reached.[106] In any case, as a consequence of the Supreme

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102. *Id.* at 977.

103. Samir Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, LAW360 (Feb. 28, 2022, 1:25 PM), https://www.law360.com/articles/1468363/bankruptcy-is-optimal-venue-for-mass-tort-cases [https://perma.cc/2ZP6-99M3].

104. *See supra* notes 95-96 and accompanying text.

105. The 95-plus percentage acceptance of the plan in *Purdue Pharma* among voting creditors is some indication of this point—particularly when, without the Sackler family contributions, the result would be "inevitable fighting over a far smaller and less certain recovery." *In re* Purdue Pharma, L.P., 633 B.R. 53, 60-61, 84 (Bankr. S.D.N.Y. 2021).

106. *See id.* at 109. It is also possible that individual members of the Sackler family will file their own bankruptcy cases or that Congress could intervene. Amy Howe, *Court Conflicted Over Purdue Pharma Bankruptcy Plan that Shields Sacklers from Liability*, SCOTUSBLOG (Dec. 4, 2023, 4:42 PM), https://www.scotusblog.com/2023/12/purdue-bankruptcy-sacklers/ [https://perma.cc/UE2F-V8EQ]. The one thing for sure is that more delay in any payouts is on the horizon. Brian Mann & Nina Totenberg, *Supreme Court Rejects Controversial Purdue*

Court's decision, a race to trial in the direct claims against the Sacklers will now ensue.[107] In that event, a handful of tort victims may, someday, receive compensation greater than what they would have been paid under the rejected Purdue Pharma plan, even adjusted for time value.[108] However, most will not.[109] This is precisely the result bankruptcy is intended to avoid.[110] Perhaps this is an important reason why over 95 percent of the claimants who voted on the plan, including most of the government entities, favored its approval.[111] They did so because it was preferable to continued costly litigation, with its prospects for intractable delay;[112]

Pharma Bankruptcy Deal, NPR (June 27, 2024, 4:12 PM), https://www.npr.org/2024/05/30/nx-s1-4986029/purdue-scotus-sackler-bankruptcy-oxycontin [https://perma.cc/ZWD8-VS5S]

107. Alison Durkee, *Billionaire Sackler Family Members Could Face Fresh Lawsuits After Purdue Opioid Settlement Falls Apart*, FORBES (July 9, 2024, 1:24 PM), https://www.forbes.com/sites/alisondurkee/2024/07/09/billionaire-sackler-family-members-could-face-fresh-lawsuits-after-purdue-opioid-settlement-falls-apart/ [https://perma.cc/5UEA-9CQR].

108. *See* Anthony Casey, Joshua Macey & Edward Morrison, *What Happens After the Supreme Court's Debacle in Purdue Pharma*, HARV. L. SCH. BANKR. ROUNDTABLE: PURDUE PHARMA BANKR. SERIES (July 18, 2024), https://bankruptcyroundtable.law.harvard.edu/2024/07/18/what-happens-after-the-supreme-courts-debacle-in-purdue-pharma/ [https://perma.cc/8UWN-KKN9].

109. *See id.* ("The costs of mass tort litigation can wipe out the assets of the injurer, its insurers, and other related parties. And the victim recoveries vary arbitrarily, with big recoveries going to the creditors (and lawyers) who sue first, and little or nothing going to victims who come later.").

110. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 10-12 (1986).

111. *See* Casey et al., *supra* note 108. Similar concerns led Johnson & Johnson to announce a plan for consensual, prepackaged Chapter 11 bankruptcy so that its talc subsidiary could settle nearly all talc-based products liability suits for $6.5 billion. Business Wire, *Johnson & Johnson Announces Plan by its Subsidiary, LLT Management LLC, to Resolve All Current and Future Ovarian Cancer Talc Claims Through a Consensual "Prepackaged" Reorganization*, YAHOO FINANCE (May 1, 2024), https://finance.yahoo.com/news/johnson-johnson-announces-plan-subsidiary-103000203.html [https://perma.cc/73VB-PD44]. This came on May 1, 2024, after two federal courts used § 1112(b)'s implied good faith filing requirement to bounce Johnson & Johnson from bankruptcy court. *See In re* LTL Mgmt., L.L.C., 652 B.R. 433, 453 (Bankr. D.N.J. 2023), *aff'd*, 64 F.4th 84, 110 (3d Cir. 2023). On September 20, 2024, after a court approved 83 percent of ovarian cancer claimants and increased the settlement commitment by $1.75 million, Johnson & Johnson announced yet a third filing—this time by its subsidiary Red River Talc, L.L.C. *See* Press Release, Johnson & Johnson, *Johnson & Johnson Announces That its Subsidiary, Red River Talc LLC, Has Filed a Voluntary Prepackaged Chapter 11 Case to Resolve All Current and Future Ovarian Cancer Talc Claims* (Sept. 20, 2024), https://www.jnj.com/media-center/press-releases/johnson-johnson-announces-that-its-subsidiary-red-river-talc-llc-has-filed-a-voluntary-prepackaged-chapter-11-case-to-resolve-all-current-and-future-ovarian-cancer-talc-claims [https://perma.cc/295M-WHTP].

112. *See* Mann & Totenberg, *supra* note 106.

inconsistent (or just widely disparate) verdicts;[113] and potential exhaustion of the resources that might leave the victims arriving late to the party with no recompense.[114]

The subject of muckraking books, documentaries, and mini-series,[115] neither Purdue Pharma nor the Sackler family are appealing defendants. It was not just the OxyContin itself. Purdue Pharma's marketing of the pill as rarely addictive and a panacea for all manners of chronic pain, helped cause a major public health crisis that has led to hundreds of thousands of deaths and an untold number of debilitating addictions.[116] However, at least in the short run, the *Purdue Pharma* decision has saved the Sacklers billions of dollars and probably put Purdue Pharma out of business. It also means victim compensation will be further delayed. It is difficult to see those ramifications as desirable consequences, implying we should perhaps temper our zeal to see the Sacklers receive their comeuppance. Confirmation of Purdue Pharma's plan may not have been condign justice, but it would have counted as a win.

If criminal mischief occurred, appropriate action should be taken.[117] It is not, however, the role of the bankruptcy system to deliver that kind of justice. Instead, we have a situation out of control, with tens of thousands of victims, myriad lawsuits across the country, and a company responsible for the harm unable to provide anything approaching adequate redress. The only pragmatic

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113. *See* Casey et al., *supra* note 108.

114. *Id.*

115. The Sacklers have been the subject of, inter alia, the Netflix miniseries PAINKILLER (Netflix 2023); a two-part HBO documentary titled THE CRIME OF THE CENTURY (HBO 2021); and Patrick Radden Keefe's book, PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021). This scathing media coverage led one author to describe the Sacklers as "the opioid crisis's most notorious villains." Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 664 (2020).

116. *See* Shraddha Chakradhar & Casey Ross, *The History of OxyContin, Told Through Unsealed Purdue Documents*, STAT (Dec. 3, 2019), https://www.statnews.com/2019/12/03/oxycontin-history-told-through-purdue-pharma-documents [https://perma.cc/H3L5-7TGG].

117. The 2020 plea agreement between the Department of Justice and Purdue Pharma and members of the Sackler family would have assured this. *See supra* note 40. It is unclear what will happen to this deal now that Purdue Pharma's plan has been rejected, as the agreement permits Purdue to withdraw its plea in the event of rejection. Letter from U.S. Dep't of Just., U.S. Att'ys Off. for Dist. of N.J., to Patrick Fitzgerald, Esq., Purdue Pharma L.P., (Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1329576/dl [https://perma.cc/22HH-422T] ("Purdue may withdraw its pleas of guilty if ... the Bankruptcy Court rejects, or otherwise declines to confirm, a Plan of Reorganization proposed by Purdue.").

solution was Chapter 11 and confirmation of Purdue Pharma's plan, bearing in mind that the Sacklers are and would no longer be in control.

Going forward things will only get worse. I understand the stubborn resolve not to allow the Sacklers, having apparently been responsible for damaging the lives of so many individuals and families, to walk away scot-free. Over six billion dollars, however, even if only a portion of the fortune made by the family from opioids,[118] could hardly be described as "unscathed." Any further reckoning should have been consigned to another day and a higher authority.

III. PROPOSALS TO AMEND THE CODE

Even before the Supreme Court's decision in *Purdue Pharma*, some commentators called for Congress to amend the Code in order to expand the statutory authority permitting nonconsensual nondebtor releases beyond asbestos disease cases. In a thoughtfully crafted student note,[119] one author cited the Second Circuit's *Purdue Pharma* decision as presenting a win-win scenario for all parties.[120] Building, then, on a proposal made a couple of years earlier to

118. The net worth of the Sackler family has been estimated at $11 billion. Press Release, Carolyn B. Maloney, Representative, House Comm. on Oversight and Accountability, Committee Releases Documents Showing Sackler Family Wealth Totals $11 Billion, (Apr. 20, 2021), https://oversightdemocrats.house.gov/news/press-releases/committee-releases-documents-showing-sackler-family-wealth-totals-11-billion [https://perma.cc/HQV7-Y7SF]. A release of third-party tortfeasors in exchange for less than what is owed to claimants is what Professors Schroeder and Carlson refer to as a "theft plan," and, as such is, in their view, the type of injunction that properly can be considered illegitimate. *See* Schroeder & Carlson, *supra* note 38, at 4. If the Sacklers had contributed their *entire* net worth—which still would have been well short of the trillions of dollars of tort claims—perhaps that would pose a different situation, although in that case one would presume that they would simply file their own bankruptcy cases.

119. Sarah Melanson, Note, *Evaluating Nondebtor Releases: How Purdue Pharma Emphasizes the Need for Congress to Resolve the Decades-Long Debate*, 55 CONN. L. REV. ONLINE 1, 1(2023), https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1573&context=lawreview [https://perma.cc/MJ4Q-KJGE]; *see also* Smith, *supra* note 9, at 1649 (citing unique aspects of the Code that make the bankruptcy system best suited to achieve the ultimate goals in mass tort litigation).

120. Melanson, *supra* note 119, at 36. *But see* Natalie R. Earles, Comment, *The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants*, 82 LA. L. REV. 519, 523-24 (2022) (taking the opposite view that MDL is the best option for resolving mass tort litigation).

expand § 524(g) to cover all mass tort cases,[121] the author proposes going even a step further and including *any* mass litigation (such as securities fraud), defined as affecting a group of "no fewer than 100 similarly impacted persons who have civil liability claims against the same defendant arising out of the same act or omission."[122] While intriguing, this approach ignores, or at least minimizes, a principal rationale for § 524(g), which is the potentially long latency period characterizing most product and emission cases, or repression of memory in the case of sexual abuse. It also overlooks a golden opportunity to revisit the crafting of § 524(g).[123]

In an article published in the year prior to the Second Circuit's decision in *Purdue Pharma*, Professor Samir D. Parikh, an expert and frequent commentator on mass tort restructurings,[124] took a somewhat more nuanced approach, focusing both on revision of the future claims representative process,[125] as well as nondebtor releases. With respect to the latter, as contemporary mass tort increasingly involve non-asbestos liability, Parikh proposed that § 524(g)(2)(B)(i)(I) be expanded to include any corporate debtors named in multidistrict litigation or that the bankruptcy court determines entail sufficient future demands for payment that "cannot be addressed equitably without the subsection's protections."[126] However, he also accurately pointed out that just modifying § 524(g) so that all mass tort cases are potentially covered is an incomplete and unsatisfactory solution.[127] Thus, he offered further

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121. Richard L. Epling, *Third-Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?*, 75 BUS. LAW. 1747, 1756 (2020).

122. Melanson, *supra* note 119, at 25-26, 35 (quoting 11 U.S.C. § 524(g)(8)).

123. I am not unmindful of the fact that, hopefully, to a slightly lesser extent, the same criticism can be levelled at this work. However, my principal focus in this treatment is on the nondebtor releases.

124. *See, e.g.*, Samir D. Parikh, *Mass Exploitation*, 170 U. PA L. REV. ONLINE 53 (2022), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1265&context=penn_law_review_online [https://perma.cc/33DY-ENGD].

125. Parikh, *supra* note 9, at 496-500 (proposing to make future claims representatives better advocates for future claimants by taking appointment away from the corporate debtor and handing it over to the U.S. Trustee, as well as appointment of a committee of future claims representatives rather than just one).

126. *Id.* at 500. This would apply to all persons named as defendants in personal injury, wrongful death, or property damage actions. *Id.*

127. *Id.* This would also alleviate the problem of non-asbestos defendants seizing all of the benefits of § 524(g) while escaping those restrictions that are unappealing. *Id.* at 484.

amendments affecting classification, voting, and certain restrictions that he believes ineffectively attempt to link the settlement trusts fortunes to the reorganized debtor's post-petition success.[128]

There is a good deal to be said for Parikh's proposals, including, principally, restoring discretion to the bankruptcy courts to make judgments about cases that have not been assigned for consolidated pretrial proceedings by the Judicial Panel on Multidistrict Litigation.[129] However, what it arguably lacks is a non-exhaustive list of prudential factors or guiding principles to be taken into account by the bankruptcy courts facing the decision whether to approve proposed nonconsensual nondebtor releases in a plan of reorganization, which is the approach the majority of the circuits followed pre-*Purdue Pharma*. While every case, of course, is different such that any strict formulaic approach would unwisely handcuff the courts, the mandatory *consideration* of a uniform set of factors would tend to promote greater consonance and discipline in the decisional law.

In *Manville*, the bankruptcy court extended the liability shield beyond the debtor because of concerns that the reorganization could not succeed without their contribution.[130] Section 524(g)(4)(A)(ii), which authorizes nonconsensual third-party releases in asbestos cases, identifies what categories of persons may be covered by the plan's channeling injunction,[131] but currently does not set a standard to methodize when their issuance is appropriate.

The circuit courts that, prior to *Purdue Pharma*, concluded nondebtor releases were permissible under the Code and the courts' equitable authority,[132] tended to rely on various fact-based standards to determine if extension of the channeling injunction was appropriate.[133] This represented a healthy expansion on *Manville's*

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128. These include eliminating the 75 percent approval requirement by tort claimants and eliminating the requirements in §§ 524(g)(2)(B)(i)(II)-(III). *Id.* at 500-01.

129. *Id.* at 484, 500.

130. *See* RICHARD A. NAGAREDA, ROBERT G. BONE, ELIZABETH CHAMBLEE BURCH & PATRICK WOOLLEY, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 755-56 (3d ed. 2020).

131. 11 U.S.C. § 524(g)(4)(A)(ii).

132. *See supra* note 32.

133. For example, in *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 142-43 (2d Cir. 2005), although affirming the confirmation of the plan on the basis of equitable mootness, the court stated that a finding of a material contribution to the plan, without consideration and findings as to other factors, a nondebtor release in a plan should not be permitted.

insistence that the nondebtor releases must be essential to ensuring a successful reorganization. Indeed, courts came to approve third-party releases if such an injunction was "necessary to do the [specific] deal embodied in the plan of reorganization."[134] Most important among the relevant considerations was whether, in exchange, the released nondebtors facilitated settlement by contributing substantial funds to the trust.[135]

As things turned out, the Second Circuit's decision in *Purdue Pharma* did not provide the roadmap it might have for the Supreme Court for when third-party releases are appropriate because of the majority's obstinate insistence on unequivocal statutory authority to sanction such an injunction in the first place. It could, however, provide just that for Congress, so the opinion is worth a closer look. Building upon and amplifying its earlier analysis in *In re Metromedia Fiber Network, Inc.*,[136] the Second Circuit panel held that a plan containing nonconsensual third-party releases in non-asbestos liability cases is permissible provided the bankruptcy court assures satisfaction of relevant equitable considerations by engaging in and making specific findings relating to a seven-pronged multifactor inquiry.[137] Such a fact-intensive inquiry necessarily would have ceded considerable discretion exactly where it belonged: to the judge who had overseen the case from the jump.[138]

The opinion could rather easily be crafted into legislation applying to issuance of nonconsensual third-party releases in all

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134. Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 988 (2022); *see In re Metromedia Fiber Network*, 416 F.3d at 143 ("A nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan, focusing on the considerations discussed above." (citations omitted)).

135. *See* Brubaker, *supra* note 134, at 966; *see also* Markland v. Davis *(In re* Centro Grp., L.L.C.), No. 21-11364, 2021 WL 5158001, at *3 (11th Cir. Nov. 5, 2021) (per curiam) (permitting a nondebtor release even though it was "not to ensure success for a reorganized entity by eliminating liability against third parties but ... to facilitate a settlement agreement").

136. *In re* Purdue Pharma L.P., 69 F.4th 45, 64, 75-77 (2d Cir. 2023), *rev'd and remanded*, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024).

137. *Id.* at 78-79.

138. *See id.* at 82. Although short-lived, this marked a welcome respite from the tendency in both Congress and the appellate courts to constrain the discretion of the bankruptcy courts. *See generally* Mason Spedding, Note, *The Erosion of Judicial Discretion: Why Congress and the Court Should Curb Restrictions for Bankruptcy Judges*, 49 BYU L. REV. 1219 (2024).

forms of mass tort restructurings.[139] The model is out there in § 4(b) of the Uniform Voidable Transactions Act, which has long followed the "badges of fraud"[140] approach that had characterized the reasoning in pre-codification caselaw going as far back as *In re Twyne's Case*.[141] Likewise, subsection (g)(4) of an amended § 524(g)—revised to apply to all mass tort reorganizations—could (1) codify and dictate consideration of the factors that the Second Circuit indicated must be considered; (2) require specific findings as to each; and (3) acknowledge the overriding influence of equitable considerations that might allow the court to deny the injunction even where all the factors are satisfied, or issue the third-party injunction even absent satisfaction of one or more of these factors.[142] Thus, a revised version of § 524(g) might, in pertinent part, look as follows:[143]

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under Chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section and ensure the success of the plan and preserve the res for future claimants.

* * *

(2)(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

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139. *Cf.* Andrew Klauber, *Discharging Equity:* Harrington v. Purdue Pharma L.P. a*nd the Validity of Nonconsensual Third-Party Releases*, 19 DUKE J. CONST. L. & PUB. POL'Y 77, 120 (urging, as it turned out to no avail, affirmance of the Second Circuit's multifactor approach for ascertaining whether proposed nonconsensual third-party releases are necessary and appropriate).

140. UNIF. VOIDABLE TRANSACTIONS ACT § 4(b) (UNIF. L. COMM'N 2014).

141. 76 Eng. Rep. 809 (1601).

142. *See Purdue Pharma*, 69 F.4th at 79 ("Although consideration of each factor is required, it is not necessarily sufficient—there may even be cases in which all factors are present, but the inclusion of third-party releases in a plan of reorganization should not be approved.").

143. Because I have limited my focus in this Essay to the aftermath of *Purdue Pharma*, I have only paid limited attention to other aspects of § 524(g) that might be ripe for reconsideration, most notably the rules and process surrounding the future claims representative. For one proposal in that regard, see Parikh, *supra* note 9, at 496-99.

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in multiple personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by—

(aa) the presence or use of, or exposure to, allegedly dangerous, defective, or harmful products or emissions; or

(bb) unlawful, wrongful, or other tortious conduct by one or more of the debtors, their agents, affiliates employees, or others acting on their behalf; and

(II) is to be funded in part by the securities of the debtors involved in such plan and by the obligation of such debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor; or

(bb) the parent corporation of each such debtor;

(IV) is to use its assets or income to pay claims and demands; and

* * *

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any direct or derivative action brought against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be personally or vicariously liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

* * *

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

* * *

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third partiesy (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third parties; and (iii) with respect to each third party to which injunctive relief has been imposed pursuant to subparagraph (4)(A)(ii), the court, in addition to having made the determination required by subparagraph (B)(ii), must have considered and made specific written findings with respect to, each of the following factors—

(I) the identity of interest between the debtor and the third party;

(II) the interrelationship between the enjoined claims against the debtor and against the third party;

(III) whether the scope of the injunction if necessary to the plan;

(IV) the importance of the injunction to the success of the debtor's plan of reorganization;

> *(V) the value of the assets contributed by the third party to the plan of reorganization;*
> *(VI) the percentage of claimholders voting in favor of the plan of reorganization beyond the minimum required under subdivision (2)(ii)(B)(IV)(bb); and*
> *(VII) whether the plan or reorganization provides fair payment of the enjoined claims.*
>
> *(iv) No single factor or collection of factors listed in subparagraph (4)(B)(iii) shall be regarded as dispositive of the question of whether to grant third-party injunctive relief under subparagraph (4)(A)(ii).*

* * *

IV. OTHER ALTERNATIVES

A. Consensual Releases and Full-Pay Plans

If Congress fails to act, the next best, albeit "next" by a longshot, would be to construe the holding in *Purdue Pharma* as narrowly as reasonably possible. Such an undertaking begins with an emphasis on what the majority opinion in *Purdue Pharma* did *not* decide. To start with, Justice Gorsuch's opinion states quite directly that, "[n]othing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan."[144] The Court offered no guidance or indication, however, as to what constitutes a "consensual" release, nor did it address whether third-party releases might be permitted in a plan calling for full satisfaction of claims,[145] although exactly what constitutes a "full-pay" plan is something of a mystery.[146]

Finally, Justice Gorsuch made clear that "we do not address whether our reading of the bankruptcy code would justify unwind-

144. Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2087 (2024) ("[Consensual releases] pose different questions and may rest on different legal grounds.").

145. *Id.* at 2088.

146. *See* David R. Kuney, *The Aftermath of* Purdue Pharma*: The Myth of the Full-Pay Plan*, 43 AM. BANKR. INST. J. 12, 13 (2024).

ing reorganization plans that have already become effective and been substantially consummated."[147] Lawyers for the Boy Scouts of America were quick to pounce on this point in a filing with the Third Circuit, where an appeal is pending on confirmation of its plan of reorganization that went effective more than a year earlier.[148]

B. Opt-Out

The majority opinion in *Purdue Pharma* left no room for doubt that consensual third-party releases are not off the table, but abjured from offering guidance of any kind over what constitutes assent. Thus, one may fairly assume this is likely, going forward, to be the subject of considerable debate and litigation. One possibility is negative notice. That is to say, to infer acquiescence by a vote to accept or a failure to vote or object. This approach, while adopted in some districts for certain matters by local rule,[149] would rip a rather large hole in the *Purdue Pharma* holding in a situation like *Purdue Pharma* where the overwhelming number of tort claimants did not vote on the plan.

A less draconian model, but one that still placed the burden of taking action on the tort claimants, would be an opt-out approach.[150] This would entail the argument that the releases are consensual in any circumstance where the claimants are provided proper notice

147. *Purdue Pharma*, 144 S. Ct. at 2088. Because implementation of Purdue Pharma's plan had been stayed, this allowed the court to avoid taking a position on the doctrine of equitable mootness. *See infra* Part V.B.

148. The request for a stay pending appeal was denied in the Boy Scouts's case. *See In re* Boy Scouts of Am. & Del. BSA, L.L.C., 2023 WL 9598837, at *1 (3d Cir. Nov. 02, 2023), *aff'd*, Claimants v. Boy Scouts of Am., 144 S. Ct. 883 (2024) (Alito, J., in chambers).

149. *See, e.g.*, Bankr. M.D. Fla. Local Rule 2002-4(a).

150. Courts diverge on adopting this approach post-*Perdue Pharma*. *Compare In re* Robertshaw US Holding Corp., 662 B.R. 300, 322 (Bankr. S.D. Tex. 2024) (rejecting the U.S. Trustee's argument that, under *Purdue Pharma*, a consensual plan required opt-in rather than opt-out), *with In re* Tonawanda Coke Corp., 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (suggesting that release of nondebtors may not be permitted when creditors are only entitled to opt out). *See also In re* Smallhold, Inc., No. 24-10267, 2024 WL 4296938, at *8 (Bankr. D. Del. Sept. 25, 2024) (holding that after *Purdue Pharma* an "affirmative consent is required"). In fact, the court in *Smallhold* concluded that *Purdue Pharma* overruled the courts's previous holding in *In re* Arsenal Intermediate Holdings, L.L.C., No. 23-10097, 2023 WL 265592, at *1 (Bankr. D. Del. Mar. 27, 2023), in which the court had concluded that an opt-out plan might be deemed consensual.

and an adequate opportunity to opt out of the releases and chose or are deemed to have chosen not to do so by inaction. Such manifestation of consent through failure to act would apply to any impaired creditors who abstain from voting on the plan, or who vote to reject the plan but do not otherwise opt out of the releases. Certainly, the model is out there in some cases,[151] although the issue is not free from controversy.[152] In situations where opt-out is used to obtain consent via implication, the focus is typically on the conspicuousness of the opt-out right. The problem with the opt-out alternative is it may not be particularly helpful or effective in the mass tort context. As the Boy Scouts of American pointed out in their *Perdue Pharma amicus*, "even a highly conservative estimate of 'opt-out' releases ... would leave nondebtors exposed to significant liabilities through the tort system and leave [Boy Scouts of America] without essential revenues to continue operating."[153]

C. Equitable Mootness

Of course, implementation of the plan in *Purdue Pharma* was stayed pending the Supreme Court's ruling.[154] Had it not been, the outcome might well have been different because of the doctrine of equitable mootness, which is essentially a common law abstention doctrine.[155] Equitable mootness allows appellate courts to dismiss appeals from a bankruptcy court's confirmation order in certain circumstances.[156] Although the doctrine is meant to be applied sparingly, complex mass tort reorganizations are ideal candidates for its application once the plan has substantially moved forward on

151. *In re* Avianca Holdings S.A., 632 B.R. 124, 136-37 (Bankr. S.D.N.Y. 2021) (holding that an opt-out structure for consensual third-party releases, as opposed to opt-in, is permissible in a Chapter 11 plan, "provided that a clear and prominent explanation of the procedure is given"). *See generally* Marshall S. Huebner & Kate Somers, *Opting into Opting Out: Due Process and Opt-Out Releases,* 43 AM. BANKR. INST. J. 26 (2024).

152. For contrary authority, see *In re* Emerge Energy Servs. LP, No. 19-11563, 2019 WL 7634308, at *1 (Bankr. D. Del. 2019) and *In re* Washington Mutual, Inc., 442 B.R. 314, 321 (Bankr. D. Del. 2011).

153. Brief for the Boy Scouts of America as Amicus Curiae Supporting Respondents, Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024).

154. *See supra* note 57 and accompanying text.

155. *See, e.g.*, Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 317 (3d Cir. 2013).

156. *Id.*

the basis that it is simply too late to unscramble the eggs.[157] Although heavily criticized,[158] the doctrine persists in some form within every circuit that has jurisdiction over bankruptcy appeals.

The problem with this "solution" is two-fold. First, it makes the decision whether to stay the proceeding pending appeal effectively a decision on the merits of the underlying issue. It is not at all clear that this is a healthy way to address matters of this import. However, even more fundamentally, while it could have an impact on cases in the pipeline, it would be of little utility going forward. Specifically, after *Purdue Pharma*, it is inconceivable that a bankruptcy court would confirm a plan containing nonconsensual releases unless Congress has, in the interim, taken action. That said, given the uncertainty over what constitutes "consent" to a proposed nondebtor release, it is not out of the realm of possibility a court might confirm a plan as "consensual," and the ability to obtain a review thereof on appeal blocked by the doctrine of equitable mootness unless a stay is granted.

D. Temporary Releases

One bankruptcy court has held,[159] and another implied,[160] that *Purdue Pharma* does not constrain the court from issuing a *temporary* release. Obviously, a stay of execution is not the same as a grant of clemency. Thus, its utility is limited, and, in both cases, the duration of the relief was quite short.[161] Nonetheless, because

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157. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Wilmington Sav. Fund Soc'y (*In re* MPM Silicones, L.L.C.), 874 F.3d 787, 804 (2d Cir. 2017).

158. *See, e.g.*, Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377, 397-98 (2019).

159. Coast to Coast Leasing, L.L.C. v. M&T Equip. Fin. Corp. (*In re* Coast to Coast Leasing, L.L.C.), No. 24-03056, 2024 WL 3454805, at *3 (Bankr. N.D. Ill. July 17, 2024) (granting a preliminary injunction to give debtor's management a breathing spell).

160. *In re* Parlement Technologies, Inc., No. 24-10755, 2024 WL 3417084, at *1 (Bankr. D. Del. July 15, 2024) (finding it unwarranted in the case, the court nevertheless concluded that *Purdue Pharma* does not preclude bankruptcy courts from granting third parties the protection of a preliminary injunction).

161. *See In re Coast to Coast Leasing, L.L.C.*, 2024 WL 3454805, at *4 (granting a temporary restraining order that lasted 14 days).

consensual releases are not forbidden under *Purdue Pharma*, it keeps the conversation going longer, which can only be a good thing.

It is also possible that bankruptcy judges, in appropriate situations, might expand on what constitutes "temporary" in this context in a fashion that would promote the chances for a consensual bargain. After all, a temporary pause to permit an orderly process to ensue is what the automatic stay is all about.[162] On the other hand, one might be justifiably and equally concerned about what *Purdue Pharma* could mean for the longstanding practice of allowing extension of the automatic stay to nondebtors in appropriate cases. Thus, it should be interesting to watch how this line of reasoning develops.

CONCLUSION

Too much ink has been spilled in casting the debate about mass-tort reorganization in terms of good and evil. To be sure, there have been some bad actors along the way, doubtless including members of the Sackler family. Mass tort cases present unprecedented issues of amplitude due to the sheer scope and size of liability. Conventional litigation tools have not proved up to the task. Defendants, therefore, have turned to Chapter 11, which does offer a path forward. It is natural to be suspicious of companies that have perpetrated, and in some cases hidden, wrongdoing. This is why emotions run high in mass tort reorganizations. However, whatever the original motive for filing may have been, it recedes into background noise as old management is displaced, and the case proceeds under the neutral and watchful eye of an experienced bankruptcy judge.

In certain instances, third-party releases can be an appropriate tool in achieving confirmation of a workable and equitable plan of reorganization, as well as in ensuring its success. The Supreme Court has now removed that option from the bankruptcy court's toolbox. It did so because, other considerations largely aside, Congress did not green light that power in unmistakenly clear terms. Thus, the simple solution is to give the Court what five

162. Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2091 (2024) (Kavanaugh, J., dissenting).

Justices wanted to see in order to achieve the fair and equitable result that the dissenting Justices felt had been thwarted by the majority opinion.

In this treatment, I have offered a proposal for doing just that. The fact that some wrongdoers may benefit from this relief is not enough reason alone to deprive both known and unknown victims and victim families a prompt and fair resolution of their claims.